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IN THE

Supreme Court of the United States

DECEMBER TERM, 1959

No. 607

FRANCIS J. CURTIS, TRUSTEE IN BANKRUPTCY FOR BROKERS INSURANCE AGENCY, INC.,

Petitioner,

RUSSELL BAKER, JOHN C. McKENZIE AND DWIGHT HIGHTOWER, individually, and as co partners, doing business as BAKER, McKENZIE and HIGHTOWER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

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IN THE

Supreme Court of the United States

DECEMBER TERM, 1959

No.

FRANCIS J. CURTIS, TRUSTEE IN BANKRUPTCY FOR BROKERS INSURANCE AGENCY, INC.,

Petitioner,

v.

RUSSELL BAKER, JOHN C. McKENZIE AND DWIGHT HIGHTOWER, individually, and as co-partners, doing business as BAKER, McKENZIE and HIGHTOWER,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

Gale L. Marcus, on behalf of Francis J. Curtis, Trustee in Bankruptcy for Brokers Insurance Agency, Inc., prays that a writ of certiorari issue to review the judgment of the Appellate Court of the State of Illinois from which leave to appeal was denied by the Supreme Court of the State of Illinois on September 23, 1959 and final judgment entered on September 23, 1959.

OPINION.

The opinion of the Appellate Court of the State of Illinois is reported 21 Ill. App. 2d 196, 157 N.E. 2d 773. (App. 1)

JURISDICTION.

The judgment of the Supreme Court of the State of Illinois denying leave to appeal is dated and was entered on September 23, 1959. The jurisdiction of this court is invoked under 28 U.S.C. sec. 157(3); F.C.A. 1257(3).

QUESTION PRESENTED.

May a state deprive a bankrupt estate of an asset by forcing the trustee to pay a provable claim in a higher priority than it is given by the National Bankruptcy Act?

STATUTES INVOLVED.

The pertinent provisions of the statutes of the State of Illinois are:

Ill. Rev. Stat. ch. 32, sec. 142:

"No corporation required to pay a franchise tax . . . under this act shall maintain any action at law . . . until all such franchise taxes; . . . have been paid."

Ill. Rev. Stat. ch. 83, sec. 16:

"Actions on unwritten contracts . . . and all other civil actions . . . shall be commenced within five years next after the cause of action accrued."

11 U.S.C. sec. 29(a):

"A . . . trustee may, within two years subsequent to the date of adjudication or within such further period of time as the federal or state law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitations fixed by federal or state law had not expired at the time of filing the petition in bankruptcy."

11 U.S.C. sec. 29(e):

"A trustee . . . may, with the approval of the court, be permitted to prosecute as . . . trustee any suit commenced by the bankrupt prior to the adjudication with like force and effect as though it had been commenced by him."

STATEMENT.

The cause of action against the defendants arose in 1950. The plaintiff instituted its action on August 4, 1952, at that time it was delinquent in payment of its franchise taxes. On August 8, 1952 the plaintiff filed a voluntary petition in bankruptcy (R. 246-249). On December 4, 1952 Francis J. Curtis was appointed trustee in bankruptcy (R. 244-248). In January 1953 the trustee authorized Gale Marcus to continue to prosecute the suit on his behalf (R. 246-249). Curtis did not obtain court permission for this action until December 1956 and did not substitute as plaintiff until May 1957.

On May 2, 1957, Francis J. Curtiss, Trustee in Bankruptcy substituted as party plaintiff (R. 184-185). On June 10, 1957, defendants filed a motion to dismiss alleging that the plaintiff was prohibited from filing this cause; that the statute of limitations had run (R. 189-206).

On September 10, 1957, defendants filed their motion to dismiss setting forth that Broker's Insurance Agency, Inc., was prohibited from filing suit for failure to pay franchise tax; that the statute of limitations had run; that Francis J. Curtiss, as Trustee, did not substitute as party plaintiff in time to toll the statute of limitations, nor was the suit prosecuted with permission of the bankruptcy court. (R. 211-212).

On September 27, 1957, plaintiff filed an answer to defendants' motion, stating that its action was in conformity with the Bankruptcy Act, as interpreted by the

federal courts; that the court's allowance of defendants' motion would deprive the trustee of alternative actions accorded him by the Bankruptcy Act and would force the estate to pay a state tax in violation of the Bankruptcy Act (R. 230-241).

On October 1, 1957, the trial court granted defendants' motion (R. 258-259).

An appeal was taken to the Appellate Court of the State of Illinois (R. 264).

The Appellate Court of Illinois held that the plaintiff could not maintain an action in the Illinois courts until its franchise tax was paid. That the tax was not paid until after the five year statute of limitations law, and therefore the suit was banned. The court further held that had the trustee instituted the proceedings this would have tolled the statute of limitations (App. 8) since the objection that the plaintiff could not use the courts would not have applied to him.

Petition for leave to appeal to the Supreme Court of the State of Illinois was filed and was denied on September 23, 1959.

REASON FOR GRANTING THE WRIT.

The opinion of the Appellate Court of the State of Illinois states:

> "In August 1952, a month after starting this suit, Brokers filed a petition in bankruptcy. It was adjudicated a bankrupt in October and Curtis was appointed the trustee in December, the same year. It is not disputed that all the assets of Brokers, including the claim against the defendants, vested in Curtis as trustee. Sec. 70(a) Bankruptcy Act, 11 U.S.C. sec. 110(a) 1952. Under Sec. 11(e) of this act,

> 'A . . . trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy.'
>
> "Curtis did not comply with this section. If he had, the proceedings would have tolled the statute; the objection that Brokers had no right to use the court would not have applied to him.
>
> "Another contention is that the Illinois Statute of Limitations must yield to the Bankruptcy Act; that the state cannot deny access to its courts by a trustee because the bankrupt has not paid its franchise tax, and hence sec. 142 of the Illinois Business Corporation Act, Chap. 32, Ill. Rev. Stat. 1957, restricts the operation of the Federal Bankruptcy Act. We do not believe there is merit to this argument. The trustee entered this case in May 1957, without Brokers having paid the tax, and he could have done so prior to 1957. The problem as to the trustee is not the payment of the tax, but his failure to follow the provisions of the Bankruptcy Act and his failure to actually become the plaintiff within the applicable period of limitations."

The Appellate Court's decision is in direct conflict with the federal courts' interpretation of 11 U.S.C. secs. 29(a)(c). The federal courts have uniformly held that the trustee need not intervene in a pending cause, *Meyer* v. *Fleming*, 327 U.S. 161, 66 S. Ct. 382, 385 (1946); *Paradise* v. *Vogtlandische*, 99 F. 2d 53 (3rd Cir. 1938), and if the trustee chooses to permit the bankrupt to continue prosecution of the suit, the bankrupt prosecutes said suit for the benefit of the trustee's estate, *Thatcher* v. *Rockwell*, 105 U.S. 467 (1880); *Johnson* v. *Collier*, 332 U.S. 538, 32 S. Ct. 104 (1911). The choice of which method to pursue is left with the trustee, *Meyer* v. *Fleming*, *supra*; *Sherman* v. *Buckley*, 119 F. 2d 282 (2nd Cir. 1941).

The reason for leaving the choice to the trustee is simple. He is in the best position to determine if the estate can bear the expense of the litigation. The Illinois Appellate Court's decision divests the trustee of the power accorded him by the Bankruptcy Act and forces the trustee to pay expenses in violation of the priority provisions of the Bankruptcy Act. Hence, said decision is in conflict with the laws of the United States.

Moreover the holding of the Appellate Court forces the bankrupt or his estate to pay taxes to the state regardless of their priority under the Bankruptcy Act. This court has held that taxes are a provable fourth class claim. *People of the State of N.Y. v. Irving Trust Co.*, 288 U.S. 329, 53 S. Ct. 389 1933)). Thus the estate is deprived of an asset unless it pays a claim in violation of the Bankruptcy Act provisions, and a debtor is prohibited from marshalling his assets unless he violates the Bankruptcy Act provisions.

In this cause the estate could not pay the tax, because of insufficient funds (R. 248). Hence the state court's decision is in conflict with the Bankruptcy Act since it does not permit the bankruptcy estate to protect its assets unless a claim is paid in a category different than provided for in the Act.

The impact of the decision will be twofold: first, it will force trustees to incur expense they are in no position to incur or lose a valuable asset, thus destroying the purpose of the Bankruptcy Act and depriving the trustee of choices accorded him under that Act; second, it will accord to a franchise tax claim a higher priority than that accorded to it by the Bankruptcy Act.

CONCLUSION.

For the reason stated, it is respectfully submitted that this petition should be granted.

.....

GALE L. MARCUS,
Attorney for Plaintiff.

APPENDIX

47407

N. Chris Jorgensen, Francis J. Curtis, Trustee in Bankruptcy for Brokers Insurance Agency, Inc., E. Keith Bowers, doing business as Ace Insurance Agency, and M. J. Law,

Appellants,

vs.

Russell Baker, John C. McKenzie and Dwight Hightower, individually, and as co-partners doing business as Baker, McKenzie and Hightower.

Appellees.

Appeal from the Superior Court of Cook County.

Mr. Justice Dempsey Delivered the Opinion of the Court.

This is an appeal by the plaintiffs from an order dismissing their third amended complaint.

The complaint has eleven counts. Three are for money had and received; the others are for fraud and deceit. The plaintiffs, who were insurance agents and brokers, allege that in the early months of 1950 they were induced to place insurance risks with the defendants, who were engaged as insurance carriers under the name of London, Amsterdam and Zurich Assurance Group. They aver the defendants issued certificates of insurance but gave no protection to certificate holders and refused to pay claims when they arose: that the plaintiffs had to make these good, and had to return premiums to the insured, under compulsion of the Insurance Department of the State of Illinois.

The amended motion to dismiss is under Sections 45 and 48 of the Civil Practice Act, Ill. Rev. Stat. 1957, Chap. 110. It raises the general objection that the complaint does not state a cause of action and that it is replete with conclusions and immaterial allegations. It raises the particular objection that the suit of the Brokers Insurance Agency, Inc., is barred by the statute of limitations.

The decisions on these objections are two of the issues before us. The third is the additional reason given by the court for dismissing the complaint, which was that the individual plaintiffs were *particeps criminis* with the defendants.

Because of their length we will not set forth either the complaint or the motion. The specific allegations which are alleged to be fraudulent are:

> "A. That the Assurance Group had been properly incorporated, was validly existing and capable and able to properly accept fire and casualty insurance risks.
>
> "B. That the Assurance Group was at said time over three years old.
>
> "C. That the Assurance Group was capitalized at Two Hundred fifty thousand dollars ($250,000) and had assets in excess of One Million Dollars ($1,000,000).
>
> "D. That the Assurance Group had standards of solvency and management meeting the requirements necessary for the protection of policyholders in accordance with Section 445 of the Illinois Insurance Code of 1937 (Ill. Rev. Stats., 1949, c. 73, sec. 1057).
>
> "E. That the Assurance Group had adequate assets, resources and reserves to pay all claims promptly as presented and proved.
>
> "F. That the Assurance Group had established a Two Hundred thousand dollar ($200,000) Trust Fund in the State of Illinois, and had adequate assets, re-

sources and reserves to thereafter increase its local deposits as needed or required by the Statutes of Illinois to protect all policyholders in Illinois."

The complaint charges that these were material representations and were untrue; that the defendants knew them to be untrue and made them to induce the plaintiffs to place insurance with the defendants; that the plaintiffs relied upon them, were deceived and defrauded thereby and suffered monetary loss and were injured in their businesses and reputations as well.

The allegations of a complaint must state all essential information together with the elements necessary to constitute the cause of action. It should do this clearly and concisely. It must avoid, on the one hand, generalities, and, on the other, evidentiary facts. This is not always easy to do; a pleader often faces the dilemma of stating too little or too much. The plaintiffs seem to have had this difficulty. One of their earlier complaints was objected to because it pleaded evidence. The record suggests that in an effort to meet the criticism of the judges who sustained previous motions to dismiss, details were eliminated, only to face the opposite objection that too few were included. The progressive Civil Practice Act of Illinois recognizes that the purpose of pleadings is to inform the opposite party and the court of the nature of the action and the facts upon which it is based. It provides that pleadings shall be liberally construed to the end that controversies may be decided upon their merits. Ill. Rev. Stat. 1957, Chap. 110, Sec. 33(3). It also makes it easy for a party to acquire more information if it is thought a pleading is lacking in specific facts. A bill of particulars can be obtained upon notice. Sec. 37.

In an action for fraud and deceit it is incumbent upon a plaintiff to show representation, falsity, scienter, de-

ception and injury. *Foster v. Chiarrelli*, 2 Ill. 2d 325; *Johnson v. Shacklett*, 335 Ill. 363. The plaintiffs have done so in this case. They plead ultimate facts upon which the essential allegations rest. We are of the opinion that this complaint states a cause of action and does so in terms which are adequately clear and definite.

In the specific averment of fraud designated as "F", the charge is: "That the Assurance Group had established a . . . trust fund." The words "had established" were used in the last two complaints, whereas the words "would establish" were used in the first two. The prior contradictions, it is claimed, have the force of judicial admissions and bind the plaintiffs. Although this objection has been argued extensively in the defendants' brief, it was not mentioned in their amended motion to dismiss; it was not before the motion judge and is not properly before this court. This objection had been presented in a previous motion to the judge who dismissed this complaint. In overruling it he said:

> "I don't think there is any merit at all in your contention that the inconsistencies in the pleadings justify a ruling now. Inconsistent pleadings, such as these can be resorted to as evidence when the case goes to trial, but that's the only advantage you can take of it."

The particular objection in reference to Brokers Insurance Agency, Inc., and its successor plaintiff, Francis J. Curtis, trustee in bankruptcy for Brokers, is brought under sec. 48(1)(c) of the Civil Practice Act: "That the action was not commenced within the time limited by law." Supporting affidavits accompany the motion. The cause of action arose early in 1950. The statute of limitations is five years. Ill. Rev. Stat. 1957, Chap. 83, Par. 16. The suit was started August 4, 1952, within the five-year period.

However, as the motion contends and the exhibits substantiate, at the time the suit was filed the plaintiff, a corporation, was in default in the payment of its state franchise tax due July 1, 1952. Ill. Rev. Stat. 1957, Chap. 32, Par. 157.142 provides: "No corporation required to pay a franchise tax . . . shall maintain any action . . . until all such franchise taxes . . . have been paid in full." It has been held that the failure to pay this tax precludes a corporation from either instituting or maintaining a legal action. *Shore Management Corp.* v. *Erickson*, 314 Ill. App. 571. Therefore, at the time this complaint was filed Brokers had no right to commence a suit in the courts of Illinois.

The first question to arise is whether starting the suit tolled the statute of limitations. No Illinois case has come to our attention in which this precise point was considered. The problem has been before the courts of some other states, and their opinions are to the effect that filing an action which could not be validly instituted does not toll the statute. *Western Electrical Co.* v. *Pickett*, 51 Col. 415, 118 P. 988; *Cleveland* v. *Ogre Bros.*, 14 Cal. App. 2d 681, 58 P. 2d 931. We are of the same opinion. Brokers did not stop the running of the statute of limitations by filing a complaint which, under the law of our state, it had no right to file.

The next question is, what is the effect of a later payment of the tax if the statute of limitations has run between the filing of the suit and the date of the payment? Our courts have not had occasion to decide this question. It arises here because in September 1957, Brokers paid its taxes for the years of 1951 to and including 1957. It had been dissolved in 1954 for the nonpayment of taxes and the order of dissolution was vacated, also in September 1957, restoring its corporate powers. The plaintiff con-

tends that its rights in the interval had been suspended only, that their revival in 1957 was retroactive to 1952 and that it is empowered to proceed with this case. Our courts have held that if a corporation, which is delinquent in the payment of franchise taxes, has started a suit, it may, by subsequent compliance with the statute, continue the prosecution of that suit. *Sternberg Dredging Co.* v. *Estate of Sternberg*, 351 Ill. App. 514; *Sheffield Steel & Iron Co.* v. *The Jos. Joseph & Bros. Co.*, 238 Ill. App. 45. This is true also of some other states. *International Trust Co.* v. *Leschen & Sons Co.*, 41 Col. 209, 922 P. 727; *Hall* v. *Citizens Nat. Trust & Savings Bank*, 53 Cal. App. 2d 625, 128 P. 2d 545. But in this case the five-year limitation had expired in 1955. If Brokers had paid its taxes and had had its corporate status restored before the expiration of the five-year period, it may have come within the rule set out in the above cases; but it did not, and we believe its effort in 1957 to get within the rule was futile as well as belated. We hold the rule does not apply when the statute of limitations has run before a delinquent corporation reacquires the right to use the courts of our state. To hold otherwise would be to ignore the effect and purpose of the statute. *Western Electrical Co.* v. *Pickett*, *supra*; *Cleveland* v. *Gore Bros.*, *supra*.

The corporate plaintiff marshals several additional reasons why its complaint should not be dismissed. Among them is the one that the objection to its capacity to sue, not having been made until June 1957, came too late. The plaintiff knew of its own default and it is difficult to understand how it could have been misled by the delay. Its argument also seems to be that a motion of this kind is in the nature of a plea in abatement and should be raised at the first opportunity. Among its authorities it cites *Keokuk Bridge Co.* v. *Wetzel*, 228 Ill. 253 (1907). This

is the leading case on the point and has been cited in other opinions. *Gilmer Creamery Ass'n* v. *Quentin*, 142 Ill. App. 448 (1908); *New York Bond & Mortgage Co.* v. *McWilliams*, 253 Ill. App. 404 (1929). The *Keokuk* case, however, does not support the plaintiff's position. It makes a distinction between a motion directed against a plaintiff corporation and one made in its own behalf by a defendant corporation. It holds that the former is a plea in bar and the latter is a plea in abatement:

> "There is some apparent confusion in the reported decisions on this question. We think, however, upon principle and authority, a plea denying that the plaintiff is now or ever has been a corporation is a plea in bar, as the sustaining of such plea would defeat the action. It would seem, however, that when a defendant files a plea in which it denies it is now or ever has been a corporation, it should give the plaintiff a better writ by pointing out to him its true character, that is, whether it is a joint stock company, a partnership or other aggregation of individuals, to the end that the plaintiff may amend and thereby avoid the abatement of his action, and that such plea is a plea in abatement."

We have found one case which supports the plaintiff, *Romano & Co.* v. *Baird & Warner, Inc.*, 262 Ill. App. 165 (1931). In the *Romano* case the defendant had made a motion to deny the plaintiff corporation access to the court because it had not paid its franchise taxes. The Appellate Court found that the defendant had failed to prove this and further held that the motion was in the nature of a plea in abatement and should have been made earlier than it was. No authorities were cited. We have read the briefs in the *Romano* case and find that neither the *Keokuk* case, nor any case following the distinction it made, was called to the court's attention. In fact, the defendant-appellant's brief cited no cases at all and the plaintiff's

but one. Because the contrary decisions were not before the court, we do not believe the *Romano* case has the weight it otherwise might have. It is our conclusion that the *Keokuk* case is controlling and that the defendants' objection was raised in apt time.

Other reasons advanced against dismissal concern Curtis who, in May 1957, intervened as plaintiff. In August 1952, a month after starting this suit, Brokers filed a petition in bankruptcy. It was adjudicated a bankrupt in October and Curtis was appointed the trustee in December, the same year. It is not disputed that all the assets of Brokers, including the claim against the defendants, vested in Curtis as trustee. Sec. 70(a) Bankruptcy Act, 11 U.S.C. sec. 110(a) 1952. Under Sec. 11(c) of this act,

> "A . . . trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State Law had not expired at the time of the filing of the petition in bankruptcy."

Curtis did not comply with this section. If he had, the proceedings would have tolled the statute; the objection that Brokers had no right to use the court would not have applied to him.

The plaintiff takes the position that it was not governed by sec. 11(c), but by sec. 11(c), which is:

> "A . . . trustee may, with the approval of the court, be permitted to prosecute as . . . trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it has been commenced by him."

The plaintiff argues that sec. 11(c) has been construed as authorizing alternative ways for a trustee to proceed. We

have seen no case which says that this section need not be followed if a trustee wishes to prosecute a suit as trustee. If he does not, there are different courses open to him. One is to do nothing about a pending case. *Paradise* v. *Vogtlandische Maschinen-Fabrik*, 99 Fed. 2d 53. The second alternative is to arrange for the attorney, who represents the bankrupt, to continue on with the pending suit. This course has been mentioned in cases where there has been a dispute over attorneys' fees. *In re Prudence Co., Inc.*, 96 Fed. 2d 157. This apparently is the alternative Curtis chose after being appointed trustee. In an affidavit filed in answer to the defendants' motion to dismiss, Curtis said that in January 1953, he directed the attorney for Brokers to continue the prosecution of the present suit. This arrangement did not bring Curtis into court, did not make him the plaintiff and did not comply with sec. 11(e). The statute is unambiguous and its direction must be literally followed if a trustee is to prosecute a suit as trustee. Although he was the party in interest, Curtis did not obtain Federal Court permission to enter this case until December 1956, and he was not substituted as plaintiff in the Superior Court until May 1957. In order for Curtis to have tolled the statute of limitations it was necessary for him to have entered the case before the statute had run. This he did not do.

Another contention is that the Illinois Statute of Limitations must yield to the Bankruptcy Act; that the state cannot deny access to its courts by a trustee because the bankrupt has not paid its franchise tax, and hence sec. 142 of the Illinois Business Corporation Act, Chap. 32, Ill. Rev. Stat. 1957, restricts the operation of the Federal Bankruptcy Act. We do not believe there is merit to this argument. The trustee entered this case in May 1957, without Brokers having paid the tax, and he could have done

so prior to 1957. The problem as to the trustee is not the payment of the tax, but his failure to follow the provisions of the Bankruptcy Act and his failure to actually become the plaintiff within the applicable period of limitations.

Several other points are made. These pertain to Par. 157.94, Chap. 32, and to sections 46(2) and 54(1), Chap. 110, Illinois Rev. Stat. 1957. We have examined these points carefully but do not think they warrant full discussion here. The plaintiff endeavors to stretch these statutes to cover the facts of this case. If we were to give the statutes the interpretation the plaintiff does, we would be distorting their meaning and purpose. We conclude that the court was correct in sustaining the amended motion to dismiss in so far as it applied to the plaintiff Brokers, and its trustee, Curtis.

There remains the third and final issue. After the motion to dismiss was presented, briefs were submitted to the motion judge. Later, when he announced his decision, he injected a reason for dismissing the complaint which had not been raised in the pleadings, arguments or briefs. With the perspicacity which was so characteristic of Judge Fisher, he discerned a possible barrier to the plaintiffs' case, which had not been apparent to others. He stated that the plaintiffs,

> "... stood in a peculiar relationship to the policyholders. They owed them a duty to ascertain at their own risk whether or not this was such a company as could do business here legally and was in a position to meet its obligations ... at least to the minimum extent required by law."

He said it appeared to him from the third amended complaint that the plaintiffs were *particeps criminis* with the defendants and, therefore, could be granted no relief. This

is an objection which involves a question of public policy and it may be raised *sua sponte* by the court. *First T. & S. Bank* v. *Powers*, 393 Ill. 97. However, we believe that this objection should not be raised and a case dismissed because of it, unless the violation of public policy is established conclusively by the pleadings, or unless it is disclosed and substantiated by evidence.

The order dismissing the complaint as to Brokers Insurance Agency, Inc., is sustained. The order dismissing the other counts of the complaint is reversed. The cause is remanded for further proceedings consistent with the views herein expressed.

Affirmed in part, reversed in part and cause remanded with directions.

McCORMICK, P. J., and SCHWARTZ, J., CONCUR.